

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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In Re: Pork Antitrust)
Litigation) (JRT/HB)
)
) MDL: 21-MD-2998
) (JRT/HB)
)
) Minneapolis, Minnesota
)
) February 4, 2022
)
) 11:11 a.m.
)

File No. 18-CV-1776

(JRT/HB)

MDL: 21-MD-2998

(JRT/HB)

Minneapolis, Minnesota

February 4, 2022

11:11 a.m.

BEFORE THE HONORABLE CHIEF JUDGE JOHN R. TUNHEIM

UNITED STATES DISTRICT COURT JUDGE

(STATUS CONFERENCE VIA ZOOM VIDEO CONFERENCE)

Court Reporter:

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P R O C E E D I N G S
IN OPEN COURT VIA ZOOM

(11:11 a.m.)

THE COURT: Good morning, good afternoon,
everyone. Let's proceed. This is In Re Pork Antitrust
Litigation. The MDL is 21-2998, Local Number here 18-1776.
Now, rather than go through and note all the appearances,
let me know who I have here and then if there is anyone else
that wish to be noted for the record, you can speak up at
that point.

For Direct Purchaser Plaintiffs, I have Mr. Clark.

Consumer Indirect Purchaser Plaintiffs, Ms. Van
Engelen, Ms. Looby.

Commercial and Institutional Indirect Purchaser
Plaintiffs, I have Mr. Finley and Ms. Aldridge.

Direct Action Plaintiffs, I won't list the
individual plaintiffs but totally we've got Mr. Bates,
Mr. Rodriguez, Ms. Lopez, Mr. Yearick, Mr. Ponzoli,
Mr. Randall, Mr. Blechman, Mr. Kaplan, Mr. Mitchell,
Mr. Gant, and Mr. Eddy.

And for defendants for Clemens, Mr. Samels,
Mr. Schwingler.

For Hormel, Mr. Coleman.

For JBS, Mr. Rashid.

For Smithfield, Mr. Robison.

1 For Triumph, Mr. Smith.

2 And for Tyson, Mr. Taylor.

3 Who am I missing that wish to be noted here?

4 MR. SCHWINGLER: Good morning, Your Honor. This
5 is Pete Schwingler from Stinson. I'm actually appearing for
6 (audio distortion) instead of Clemens.

7 THE COURT: I'm sorry. Who are you appearing for,
8 Mr. Schwingler?

9 MR. SCHWINGLER: For Seaboard Foods and Seaboard
10 Corporation.

11 THE COURT: Okay. Thank you for clarifying that.
12 Anyone else?

13 MS. GORE: Yes, Your Honor, for Direct Action
14 Plaintiffs, Kristin Gore.

15 THE COURT: All right. Let me make sure I have
16 you in the right place.

17 Thank you, Ms. Gore. Anybody else?

18 MR. MONTS: Good morning, Your Honor. It's
19 William Monts for Agri Stats. I'm appearing by phone
20 because I don't expect otherwise to speak.

21 THE COURT: All right, thank you. Good morning.
22 Anyone else? All right. Let's proceed.

23 I called a status conference this morning. I just
24 wanted to get us going. I know that there have been
25 meetings with Magistrate Judge Bowbeer, and she is working

1 hard at getting a case management and scheduling order
2 together. I've been in consultation with her, which has
3 been helpful, but I wanted to just get us together to
4 discuss some of these issues and kind of get us on a path to
5 getting moving quickly.

6 I do want to get everyone on the same track as
7 possible with discovery. I know that the class action
8 plaintiffs case is much farther ahead, but at the same time,
9 I think it's important that we get to the same point as
10 quickly as we can, as quickly as is reasonable, given the
11 situation.

12 One issue I wanted to hear from you about is the
13 issue of whether we should have a consolidated complaint
14 that can be operative throughout the case or individualized
15 complaints or even more of a hybrid approach. So who wishes
16 to speak on this issue? I would like to hear some argument
17 about this, and I will work with Judge Bowbeer on this one
18 in the next week or so.

19 MR. GANT: Good morning, Your Honor. This is
20 Scott Gant for Bois Schiller Flexner.

21 THE COURT: Yes.

22 MR. GANT: For Direct. You may recall, we spoke
23 in July during the last conference we had with you, Your
24 Honor.

25 THE COURT: Yes.

1 MR. GANT: And as a reminder, I represent Direct
2 Action Plaintiff Sysco and Armory Investments, and I also
3 served on the *Broiler Chicken Litigation* as liaison counsel
4 for all the DAPS and had that role for about four years in
5 that case. And I mention that because I think that that's
6 particularly, the *Broiler* case is particularly relevant to
7 the topic you're asking about now, Your Honor, because you
8 may recall that in the *Broiler Chicken Litigation*, Judge
9 Durkin sua sponte asked the direct action plaintiffs fairly
10 far into the case to file a consolidated amended pleading,
11 which we did pursuant to his direction over our objections.

12 The experience in that case, I think, tells us
13 about why we should not follow that approach here. And,
14 Your Honor, I presume you know that we did discuss this with
15 Judge Bowbeer on Monday.

16 THE COURT: Yes, I'm aware of that.

17 MR. GANT: Okay. And she said she was going to
18 consult with you but did offer a provisional view, which I
19 presume she shared with you.

20 THE COURT: She did.

21 MR. GANT: Okay. So our experience in the *Broiler*
22 *Litigation* is that the effect was to create a lot of
23 uncertainty, to proliferate a series of additional motions.
24 For example, there was from the outset and it remains to
25 this day uncertainty about the nature of that pleading. It

1 is unclear and the parties have a difference of opinion as
2 to whether it is purely an administrative document or
3 whether it is substantive. That is whether it's superceded
4 and displaced all the other completely individual complaints
5 because in that case, each case was initiated by a separate
6 complaint and then they were consolidated, including with
7 the class cases for purposes of organizing the case, but
8 from the perspective of the DAPS, the individual cases
9 remained, and but there has been uncertainty in numerous
10 motions, and to this date they remain unresolved.

11 But one thing that absolutely is clear it that it
12 created an enormous additional burden on the direct action
13 plaintiffs because we, after everyone filed their own
14 complaint, we all had to come together and spend time
15 putting together a document over which we didn't always see
16 eye-to-eye. There were different DAPS that had different
17 causes of action, different theories of the case, and we had
18 to put them into one document and that I can represent to
19 you as an officer of the court is a process that's taken
20 hundreds of hours of direct action plaintiff time.

21 And in fact, we are putting together a second
22 amended pleading in the *Broiler* case, which is going to be
23 filed in the middle of this month, and I can tell you again
24 we're spending hundreds of hours of attorney time
25 coordinating. We don't agree on all the issues. It causes

1 a lot of debate within the group, and the pleading is going
2 to be between 400 and 500 pages.

3 So it's shifting, and the principle rationale in
4 *Broilers* and articulated by the defendants here for doing
5 this is to ease the largely administrative burden on the
6 defendants of having to answer individual complaints. We
7 have attempted to offer a solution to that problem, which
8 I'd like to come to in a second, but there is an important
9 difference between this case and *Broilers* vis-a-vis a
10 potential consolidated pleading, which is unlike *Broilers*,
11 which is not an MDL. This, of course, is an MDL, and
12 everyone who filed a complaint outside of this district who
13 survives the pretrial proceedings and is going to trial will
14 go back home, so we have the problem here that we don't have
15 in *Broilers*, which is, well, if we have a consolidated
16 pleading, what is going to go back to the Court? And what I
17 would expect would happen here is then everyone who went
18 back to their own court would then want an opportunity to
19 refashion their own new complaint that reflected their own
20 causes of action, their own theorys, their own allegations,
21 so that we're shifting here if we adopt this process. To
22 the back end, part of what does not have to be done in the
23 *Broilers* case.

24 So I think the *Broilers*, and we attempted to learn
25 lessons from the *Broilers* case and that's why we sought an

1 MDL in this case because we learned a lot of lessons, and we
2 saw that there were a lot of complications that arose from
3 not having the *Broiler* case organized as an MDL and that's
4 why we went to the JPML here and requested one, so that is
5 an important difference here. And there are salient
6 differences. There are different causes of action asserted.
7 There are different theories with respect to, for example,
8 fraudulent concealment among the different DAPS.

9 And I think there's a presumption here in the
10 idea, at least on the defendants' part, that we can and
11 should have a consolidated pleading that we're all on the
12 same page on the DAPS, and we're not. We attempt to be
13 organized, and we'll talk about that with respect to some of
14 the other topics on your agenda, but we all have a common
15 among the DAPS is we decided we didn't want to be part of
16 the class.

17 Each client made a decision that it wants to
18 control its own fate, to hire its own counsel, and be in
19 charge of its own case, and compelling us to have a
20 consolidated pleading runs counter to that desire and that
21 initiative.

22 What we propose to the Court and to the defendants
23 is that in order to alleviate some of the burden of filing
24 answers to every single complaint is the following:

25 One, we said, one, we would like to file a

1 complete answer to one exemplar complaint. And to that,
2 within a specified time, we're discussing the exact number
3 of days but in relatively short order, but only one
4 complaint would require a complete answer in the short run.

5 The second thing that would have to happen in a
6 relative short run is that each defendant would have to file
7 any defenses and affirmative defenses to each respective DAP
8 complaint. That is important that that be done because,
9 obviously, we need to know what the defenses are that are
10 being asserted by the defendants so that we could shape
11 discovery accordingly, because if we find that out after
12 discovery is complete or nearly complete, we will not have a
13 reasonable opportunity to take discovery to try and rebut
14 those defenses.

15 So we need to know what those are and those need
16 to be asserted in conformance with the Federal Rules of
17 Civil Procedure, so that we don't have a list of defenses,
18 but we actually know what the bases for those purported
19 defenses are, and those may vary by DAP.

20 So, for example, if you have a contract case
21 defense, well, the contracts are likely different from one
22 DAP to the other, so they need to tell us, well, what is the
23 contractor pointing to? What about it do they believe
24 provides a defense and so on? So those are the two things
25 --

1 THE COURT: You're not envisioning an answer on
2 each of these to each of the complaints. You're envisioning
3 what list of defenses and if there are counterclaims of any
4 kind?

5 MR. GANT: Not only a list, it should be whatever
6 the standards are of the Federal Rules. Those should be met
7 with respect to just the defenses and affirmative defenses,
8 so they don't have to answer paragraph by paragraph the
9 allegations in the Complaint, but just a list of defenses
10 and affirmative defenses, but also the bases for them.

11 I mean something that I've confronted in my own
12 practice, Your Honor, and you may have seen is oftentimes
13 the defendants don't satisfy what I believe are their
14 obligations under the rules, to actually articulate, explain
15 what the defense is so they could just say "statute of
16 limitations", but they don't say what it is. Or they say
17 "waiver", but they don't explain what the theory of waiver
18 is.

19 So whatever their obligations are with respect to
20 responsive pleading under the rules for defenses and
21 affirmative defenses, those would be fulfilled in a short
22 run with respect to each DAP complaint, so we could know how
23 to shape the course of discovery to address those, but then
24 we would defer the rest of the answer indefinitely down the
25 line, because as long as we have an exemplar answer to one

1 complaint, we believe that that will give us what we need
2 and is an appropriate balance to be struck between what the
3 obligations of the rules are and what the needs of the
4 parties are at this point in time.

5 THE COURT: I see, okay. All right. Anything
6 else, Mr. Gant?

7 MR. GANT: Not unless you have any questions about
8 that, Your Honor.

9 THE COURT: Anyone else on the Plaintiffs' side
10 wish to speak on this?

11 MR. KAPLAN: Yes, Your Honor, Robert Kaplan. The
12 consolidated complaint is also unmanageable because every
13 time a new DAP file is transferred in, and do we have to
14 then do another consolidated complaint? It's a moving
15 target. So it's very hard to manage.

16 THE COURT: All right. Thank you.

17 MR. BLECHMAN: Your Honor?

18 THE COURT: Yes.

19 MR. BLECHMAN: If I may address the Court.

20 THE COURT: Go ahead.

21 MR. BLECHMAN: Thank you, Your Honor. William
22 Blechman from Kenny Nachwalter. We represent Kroger and
23 Albertsons, Hy-Vee, Save Mart and US Foods as Direct Action
24 Plaintiffs in this case. And I can see from my screen, Your
25 Honor, that I have something of a dubious distinction of

1 having a lot more gray hair than a number of other faces
2 that I'm seeing on the screen, having done this kind of work
3 for about 30 years, not as a class lawyer but representing
4 individual companies in these kinds of cases, including
5 MDLs, and including having served as liaison counsel in some
6 of the largest MDL antitrust cases in the country.

7 And what I'm struck by with regard to the, of
8 late, the effort by I think defendants largely to try and
9 reduce the various individual direct action plaintiff cases
10 to their lowest common denominator. Mr. Gant spoke well
11 about what the practical difficulties are of doing that.

12 But I wanted to address the Court on this point
13 because there is a suggestion or an implication in the
14 discussion about a hybrid or having a consolidated answer
15 that somehow this MDL is presenting a procedural posture and
16 circumstances that are different or radically different than
17 what has been the situation presented in most all MDLs that
18 have occurred over many, many years.

19 For example, I'm in an MDL in front of Chief Judge
20 Howell in the District of Columbia, involving a conspiracy
21 to fix price of fuel, the *Rail Fuel Surcharge Antitrust*
22 *Litigation*. There must be about 150 individual plaintiffs
23 there because the class was defeated, and I think there's
24 probably somewhere between about 20 and 30 individual
25 complaints that have been filed.

1 Where there is other MDLs that are going on right
2 now, whether it's the *Generics* MDL in the Eastern District
3 of Pennsylvania. The MDL in the *Packaged Seafood* in the
4 Southern District of California that started several years
5 ago. All of these and many, many others, vitamins, line of
6 work, graphite electrodes. I mean I can give you a long
7 list where you have a number of individual plaintiffs that
8 have filed direct actions as opposed to choosing to remain
9 in the class. And the Federal Rules of Civil Procedure
10 works just fine in securing answer defenses as and when it
11 is ripe for that to occur under the rules.

12 There are practical adverse consequences to try
13 and change that regimen at this point in this case as there
14 would be in most any other case, but one of many important
15 points is that at least I think from our experience getting
16 cases at issue having answer defenses so that you know
17 exactly what is being pled against you and then being in a
18 position when the case is ready to be renamed as many cases
19 are becomes much more difficult to do in the absence of
20 simply having answer defenses as and when filed under the
21 rules.

22 In short, and in a practical matter, Your Honor,
23 the burden here as Mr. Gant explained to you, is very, very
24 substantial on the individual plaintiffs. I question the
25 need. The burden on the defendants of having to file answer

1 defenses as they do in most every case is pretty much the
2 same as it is in other cases and, therefore, I suggest that
3 there be no change to that regimen. Thank you.

4 THE COURT: All right. Thank you, Mr. Blechman.
5 Anyone else on the plaintiffs' side on this issue?

6 MR. BATES: Yes, Your Honor. Kyle Bates for the
7 Commonwealth of Puerto Rico. Can I briefly be heard?

8 THE COURT: Yes. Go ahead, Mr. Bates.

9 MR. BATES: Thank you, Your Honor. I just wanted
10 to point out some unique aspects of this issue as it affects
11 the Commonwealth of Puerto Rico, which as Your Honor knows,
12 is the only governmental plaintiff in this case. And I
13 don't have a position on the unique aspects of the other
14 DAPS claims. I wasn't involved in the conversations Mr.
15 Gant was referencing, but I can say that there are certain
16 aspects of the direct action plaintiffs claim as a whole
17 that don't apply to the Commonwealth of Puerto Rico.

18 Puerto Rico is a governmental entity, as I've
19 mentioned. Puerto Rico is not and was not a class member in
20 any of the classes as a governmental entity that was
21 excluded, and to the extent that there are any contract
22 based claims for the defenses asserted by the DAPS, there's
23 no contract at all between Puerto Rico and any of the
24 defendants.

25 So if the Court is inclined to order that a

1 consolidated complaint be filed on behalf of the private or
2 commercial DAPS, Puerto Rico would suggest that that would
3 be inappropriate to apply to the Commonwealth of Puerto
4 Rico.

5 THE COURT: Thank you, Mr. Bates. Anyone else on
6 the plaintiffs' side?

7 Okay. For the defendants?

8 MR. TAYLOR: Your Honor, Jarod Taylor for the
9 Tyson defendants, and I can begin for defendants.

10 THE COURT: Go ahead, Mr. Taylor.

11 MR. TAYLOR: Thank you. So at a high level, I
12 think it's clear or important to understand that defendants
13 believe there will be administrative benefit to permitting a
14 consolidated complaint to the Court and certainly benefit to
15 defendants.

16 So in the Court's Order consolidating the MDL into
17 the 1776 case, one of the things the Court noted was that
18 when reviewing even just that briefing on that one issue, it
19 had to review each submission on each docket to ensure they
20 were in fact identical, and the Court said one of the goals
21 of consolidation was to conserve resources for the parties
22 and the Court by eliminating redundancies, especially as the
23 Court and parties dealing with more complicated and
24 substantive issues, and those complicated and substantive
25 issues are before us now, and with respect to filing such

1 motions to dismiss and later on down the road, the motions
2 for summary judgment, we see similar problems arising if
3 we're dealing with 24-plus complaints rather than a single
4 consolidated complaint.

5 For example, the defendants will likely file
6 partial motions to dismiss to limit at least the damages
7 period based on the statute of limitations, and having a
8 single complaint where we can see where the allegations
9 amongst the different MDL DAPS are actually, the same where
10 differences and wordings are material and more stylistic,
11 understanding that will assist defendants substantively, and
12 it should assist the Court when reviewing those filings as
13 well.

14 Similarly, multiple complaints create the
15 potential for at the very least unwieldy appendices setting
16 out multiple what defendants believe are at least
17 substantively identical allegations, and the Court will be
18 obliged then again, as it was in the briefing on the
19 consolidation, to go through and make sure that defendants
20 got it right, that each of those allegations are actually
21 identical at least materially so.

22 And Mr. Gant pointed out at the beginning that the
23 order to consolidate the complaint in the *Broilers* case was
24 done sua sponte by the Court, so that Court, obviously,
25 didn't believe that consolidation, non-consolidation had

1 become unwieldy and that there were administrative benefits
2 to consolidation.

3 I won't belabor this long, but answering over 24
4 complaints is going to take significant expense for
5 defendants and manpower resources for each of the eight
6 defendants groups. It's a significant pleading that has the
7 potential to bind each defendant to admissions, so we have
8 to treat each paragraph and each of those complaints
9 carefully, but in terms of actually guiding, you know, the
10 case, those answers probably are not going to be that
11 useful, which I think MDL DAPS can see when they propose to
12 put off the filing of those answers to most of the filing of
13 most of the answers to some indefinite time down the road,
14 but that's all it does is kick all of that work down the
15 road. It doesn't reduce it.

16 And in the meantime, it also leaves some
17 uncertainty, as I alluded to a moment ago, a consolidated
18 complaint will clarify for all the parties which allegations
19 are really materially identical and which are DAP specific
20 such that defendants can guide their discovery accordingly,
21 and DAPS proposal not only kicks the can down the road, but
22 it also leaves unresolved issues such as serial motions to
23 dismiss.

24 I think it was Mr. Kaplan's had mentioned that a
25 consolidated complaint would be unmanageable because it's

1 unclear what would happen after consolidation. But many
2 MDLs have consolidated complaints. There are ways to
3 address that. Typically, it's done with a short form
4 complaint that future plaintiffs can sign onto; but to the
5 contrary, if there is a non-consolidated complaint that
6 defendants must respond to through a motion and/or through
7 an answer now, that raises the question of what happens for
8 the next complaint? There will not be a short form
9 complaint. There will be nothing to sign onto, and so that
10 raises the question of whether we will need to have these
11 serial motions to dismiss.

12 In terms of Mr. Gant's note about the burden to
13 plaintiffs of doing this, defendants don't deny that it does
14 shift some of the burden to plaintiffs. There are going to
15 be pros and cons, whichever way the Court rules on this.
16 This is going to be a complex litigation whether we have
17 consolidation or not.

18 The idea is to eliminate complexity and allocate
19 costs across the parties fairly to the extent possible.
20 With respect, MDL DAPS are already not putting up as many
21 proponents as defendants will be, so there are many points
22 in the case in which defendants will be having greater
23 expense than the plaintiffs.

24 Also, it is our supposition that DAPS borrow
25 heavily from the direct class plaintiffs, the direct

1 purchaser class plaintiffs' complaints rather than each
2 independently doing the painstaking Rule 11 work that
3 usually proceeds an initial complaint in this case, and so
4 defendants really see this as a little bit of catch up.
5 They had an easier time of it to file their initial
6 complaint, and if they have to spend some additional amount
7 now in this consolidation process, defendants admit that
8 it's not an unfair or undue expenditure.

9 If I could go through and address some of the
10 specific criticisms of defendant's proposal that Mr. Gant
11 made. He started out by explaining that he thought the
12 *Broilers* consolidation experience shows why consolidation
13 should not take place here. To the contrary, I think we can
14 easily take the learnings from the *Broilers* case to the
15 extent there were any issues or problems, apply those
16 learnings here and avoid those problems at the outset.

17 I believe the only actual extra confusion or
18 complexity purported that was identified is the issue of
19 whether the complaint was administrative or consolidated.
20 That can be simply addressed here. Your Honor can order
21 that this is an operative, excuse me, not consolidated but
22 operative. Your Honor can order from the outset that this
23 should be an operative complaint.

24 And, in fact, there has been an order in the
25 *Broilers* case with respect to one of the two tracks of

1 direct action plaintiffs. That was simply a minute entry
2 stating that defendants' request for clarification that it
3 be operative is granted, and so it ordered that there be an
4 amended complaint, which I believe was already contemplated,
5 and that when that amended consolidated complaint is filed,
6 it will be the operative complaint. So that's simply
7 addressed here from the outset.

8 With respect to the fact that *Broilers*, the
9 *Broilers* case is not an MDL, as opposed to this case,
10 defendants don't, frankly, don't see the material import of
11 that. Those direct action plaintiffs will still be going
12 back to their individual trials and have their individual
13 cases that will be separated from the consolidated case, if
14 they get that far in the *Broilers* case.

15 As I mentioned earlier, it is not uncommon to have
16 consolidated complaints in multi-district litigation, and
17 there is ample case law confirming that it does not merge
18 the cases and that even after a consolidated complaint, the
19 individual actions can be remanded to their respective
20 districts.

21 With respect to the concern about the affirmative
22 defenses and DAPS entitlement to them now, defendants can
23 comply with pleadings rules applicable to affirmative
24 defenses in response to a consolidated complaint. We are
25 happy to outline which of those affirmative defenses apply

1 to which MDL DAPS in response to the consolidated complaint.
2 That should not be an issue.

3 And then, finally, with respect to Mr. Blechman's
4 comments on his experience and defendant's purported attempt
5 to rework the Federal Rules, it's not clear but it seems
6 like he might have been attempting to walk back MDL DAPS'
7 own proposal already for what I believe Your Honor was
8 referring to and the Court mentioned the hybrid approach,
9 which is to have an answer now, and one answer now to one
10 complaint and file the remainder of the answers to other
11 complaints later. Defendants do not agree that that is the
12 most efficient way to proceed, but I think there is
13 consensus amongst most MDL DAPS at least and defendants that
14 it's at least more workable and/or acceptable to MDL DAPS to
15 have that process rather than to have, you know, well over
16 probably 150 answers at the outset on the docket right now.
17 That I think is the worst case scenario, and I'm happy to
18 take questions from the Court.

19 THE COURT: How, if we did adopt the approach
20 where there would simply be a document that lists
21 affirmative defenses and other relevant matters to
22 individual complaints, what does that look like to you? Do
23 you know? Is it just in the format of just a -- I'm curious
24 how that works and the plaintiffs can tell me as well, but
25 what would that look like if you had to do that?

1 MR. TAYLOR: We are having some discussions, and
2 we're currently negotiating that with MDL DAPS in response
3 to a request from Judge Bowbeer. It could look like
4 affirmative, you know, the section on affirmative defenses
5 that would be in a typical answer. MDL DAPS have proposed
6 that it be filed and operative as a pleading. I don't
7 believe defendants have an objection to doing that.

8 MDL DAPS have proposed that each -- that
9 defendants should file separate affirmative defenses to each
10 of the complaints, which again will create some of what we
11 believe to be unnecessary work, and we believe that in
12 response to a consolidated complaint, again, it would be a
13 fairly simple matter simply to outline which were applicable
14 to which MDL DAP with even including particular facts, such
15 as whether one might have agreed, just as an example, to
16 some kind of vague provision or something like that but
17 another did not or a damages limitation. We can set forth
18 those specific facts even in an answer on affirmative
19 defenses to a consolidated complaint.

20 THE COURT: Do you see significant differences
21 among the direct action complaints that have been filed or
22 are they relatively similar in your view?

23 MR. TAYLOR: I think they're very similar, Your
24 Honor.

25 THE COURT: Interesting. Okay. All right. Thank

1 you, Mr. Taylor. Anyone else on the defendant's side?

2 All right. Any reply from plaintiff's side?

3 Mr. Gant, do you have anything? Or Mr. Blechman?

4 MR. GANT: I do. This is Mr. Gant, Your Honor. A
5 few quick points, if I may, and, sorry, if they don't seem
6 in any particular logical order. But I want to -- I don't
7 think the defendants dispute that in many, perhaps most
8 MDLs, there is no order to consolidate the pleading.

9 For example, Mr. Blechman mentioned the *Packaged*
10 *Seafood Litigation*, which I think we discussed with Your
11 Honor back in July. That case is a lot further along than
12 this case or the *Broilers* case, and there was never any
13 order to consolidate, and the parties were able to proceed
14 completely efficiently. There was no impediment to going
15 forward. The defendants were able to manage, and it worked
16 just fine there, and I was in that case as well for three
17 clients. So the suggestion is that this can't be done in an
18 organized and efficient way without having consolidated
19 pleadings, experience teaches us otherwise.

20 Mr. Taylor just conceded that he views the DAP
21 complaints as very similar to one another. But earlier in
22 his argument to you, Your Honor, he was saying or there's
23 this enormous burden on defendants to try to understand the
24 different DAP complaints and discern how they are different
25 from one another.

1 Well, if they are different from one another, that
2 is more to the fact that these are individual clients with
3 their own views, and we shouldn't be -- one of two things
4 would happen if we were compelled to file a consolidated
5 pleading. Either we would be forced to adopt these and
6 allegations that our clients didn't owe or make or we would
7 just be putting into one document the different allegations
8 and theories and claims that now reside in our own
9 complaints.

10 So there's less burden there, I think, than
11 defendants would actually like to admit. But to the extent
12 there are differences, there are reasons for those
13 differences, and they shouldn't be washed away by an order
14 asking us to adopt one another's views and claims and
15 theories of the case.

16 With respect to your question about what it would
17 look like for there to be a filing or a pleading of defenses
18 on affirmative defenses, I think there Mr. Taylor and I are
19 in large agreement, and on these points, I'm speaking for
20 all of the DAPS, Your Honor, because we've discussed this
21 many times internally and discussed it with Judge Bowbeer.

22 What I think this would look like is the part of
23 an normal answer that turns to the defenses and affirmative
24 defenses, so it would not be the part that has the paragraph
25 by paragraph responses, but it would be the part that in my

1 experience usually follows that where it says defenses or
2 affirmative defenses, and it lists those, and it describes
3 them with the specificity required by the rules and by cases
4 like *Twombly* and *Iqbal*, which I believe apply to
5 affirmative defenses just as much to allegations in a
6 complaint.

7 But one other point that we haven't mentioned,
8 Your Honor, is that if we are forced do consolidated
9 pleading, it takes, as I said, an enormous amount of work,
10 which means more delay. For example, Sysco filed its
11 original complaint, I believe it's now 10 months ago, and we
12 still don't have an answer and not only do we not have an
13 answer, we don't have a list of defenses and affirmative
14 defenses. And if we are forced to do a consolidated
15 pleading, that's just going to take an extra few months for
16 us to work together to do that.

17 We should start from where we are now, which is
18 take the complaints as filed, and we respectfully suggest
19 take up our suggestion to have one exemplar complaint
20 responded to in full. That would be the operative pleading,
21 responsive pleading for that complaint, and then have the
22 defendants promptly get us their defenses and affirmative
23 defenses, so that we can move ahead with discovery.

24 If we adopt their recommendation to the Court,
25 that will just delay us further and get us further apart

1 from rather than caught up to where the classes are.

2 I'm happy to answer any other questions, Your
3 Honor.

4 THE COURT: All right. That's fine. Anyone else?

5 MR. BLECHMAN: Yes, Your Honor. William Blechman.

6 THE COURT: Go ahead.

7 MR. BLECHMAN: Thank you, Your Honor.

8 Just a few points. First, with regard to the
9 mechanics of this, if the Court is going to use a hybrid
10 approach, then I think it's really important that there be a
11 very clearly set out process and timetable, so that there
12 are answers and defenses that are in fact filed, as opposed
13 to there being an exemplar pleading or consolidated pleading
14 that leaves all the DAP cases or a substantial portion of
15 them not at issue. So among the proposals that I'm aware
16 of, I don't know that there is actually a mechanism to bring
17 these cases to an issue and that's a fundamental piece of
18 this administration of the process that I think is
19 necessary.

20 Second, there is an implication here, Your Honor,
21 in what you're hearing that somehow if we just follow the
22 Federal Rules, for example, that experienced lawyers here
23 are not going to know how to do this. There's an enormous
24 amount of experience that is in this hearing and that is in
25 this case. Experienced lawyers here know how to move these

1 cases forward, and what the defendants are looking to do
2 here in a broader sense is to try to bring all the DAP cases
3 down to their lowest common denominator. Our complaint, for
4 example, contains an account brought under the Stockyard and
5 Packers Act.

6 You've heard of other differences that are in
7 other DAP complaints. There are issues about knowledge that
8 the defendants have raised with regard to some of the
9 defenses, apparently, they're going to assert.

10 In taking depositions, Your Honor, somebody is
11 going to be using a complaint in order to depose a witness.
12 You having some kind of massive consolidated pleading to my
13 sense of this presents all sorts of practical difficulties
14 and becomes enormously unwieldy in just trying to take
15 discovery, Your Honor, and that is why I remain of the view
16 that if it ain't broke, don't fix it. That if there are
17 rules and procedures that set forth how this can go, and has
18 worked successfully in other MDLs, then I don't particularly
19 see the need for us to have to do so.

20 I heard defense counsel say that this sort of
21 consolidated pleading has been ordered in many MDLs. I've
22 been in a lot of MDLs, Your Honor, and I've only seen this
23 happen of late and in a few MDLs, and I'm in a number of
24 MDLs now where this is not going on at all, and the case is
25 being administered perfectly fine. Discovery is going

1 forward.

2 And so I come back to the point I wanted to make
3 before, which is these are not class cases. These are
4 individual cases. These are experienced lawyers that you
5 have in this case, Your Honor, on both sides of the v, and
6 we know how to do this. If the Court gives us milestones
7 and targets, experienced lawyers have an understanding of
8 not wanting to burden the Court, and those are all factors
9 that would be taken into account in enabling this process to
10 move forward efficiently.

11 THE COURT: All right. Anyone else for the
12 plaintiffs?

13 All right. Anything else that you had, Mr.
14 Taylor?

15 MR. TAYLOR: If I could, just one or two points,
16 Your Honor, and I do appreciate your time.

17 But defendants do understand, as Mr. Blechman
18 said, that there are some differences among direct action
19 plaintiffs complaints. We think largely they are very
20 similar, but as Mr. Blechman noted, his clients have an
21 additional claim. That can be dealt with and will be made
22 easier to deal with with the consolidated complaint. We
23 will see where those differences are material and where they
24 aren't, and to the extent one set of MDL DAPS has some kind
25 of material difference, that can be noted, and then yes, to

1 an extent, it will be a consolidation of different claims
2 into one complaint but that is going to simplify the
3 administration of the case.

4 Everyone will have one primary pleading to
5 reference, and I think it's undeniable the Court
6 acknowledged that there are, that for the most part, the
7 complaints are the same, so they will be able to be
8 consolidated, and we're perfectly happy for the differences
9 to be pointed out where there are differences, and we will
10 answer that in our answer to the consolidated complaint.

11 And then, again, my last point with respect to Mr.
12 Blechman, I think his suggestion is not only to oppose a
13 consolidated complaint but even to oppose what has been MDL
14 DAPS proposal to us, which is to have an exemplar complaint
15 that we answer now and then answer the remaining complaints
16 later. This is the first defendants are hearing that this
17 is back on the table, and in the interest of both
18 negotiation in fairness and moving the case forward, we do
19 hope that that is not up to be revisited.

20 MR. BLECHMAN: Your Honor, if I might clarify.

21 THE COURT: Go ahead.

22 MR. BLECHMAN: I'm not looking to walk back what
23 has been presented in a coordinated way among DAPS who are
24 working together and then dealing with the defendants. My
25 comments are intended to respond to sort of the broader

1 implication in what is being suggested by the defendants
2 that if we don't do something that any directional act they
3 would like to do here, that this MDL is going to become very
4 difficult for the Court to administer.

5 And I'm here to say to you, Your Honor, that based
6 on a fair amount of experience in MDLs, and the Court has
7 experience on its own, I think that that is an urban myth,
8 that there are, in fact, all sorts of rules and procedures
9 combined with the experience that is in this MDL among the
10 lawyers to be able to move this case forward efficiently and
11 mindful of and to avoid the burdens to the Court. That's my
12 point.

13 THE COURT: All right. Thank you. I will consult
14 with Judge Bowbeer about this before wrapping that up and
15 making a decision on this. Thank you for the argument
16 today. It was very helpful.

17 All right. Other issues that we should discuss
18 here today? I set out some possibilities in an agenda. I
19 just wanted to hear thoughts from everyone.

20 Particularly on organization, I mean we've got
21 sort of two sides of the case, one fairly well organized for
22 a period of time already and the other side just getting
23 organized and how to get that all together. Do any of you
24 have additional thoughts on that?

25 MR. KAPLAN: Your Honor, this is Robert Kaplan. I

1 think the MDL DAPS are organized. We have a structured one
2 ourselves. We have a weekly call. We're processing jointly
3 the defendant's transaction data. We're participating in
4 the depositions. We have the same discovery fact cut-off
5 date, and I think we're moving along.

6 The MDL DAPS that were transferred here some time
7 ago are producing documents. We're trying to get that done
8 quickly. So I don't think we are behind the classes. I
9 think we're moving in tandem with the classes.

10 MR. GANT: Your Honor?

11 THE COURT: Yes, Mr. Gant.

12 MR. GANT: Thank you, Your Honor. To just build
13 on what Mr. Kaplan said with which I know I and other DAPS
14 are in full agreement. We have put on the proposed agenda
15 whether we need a steering committee. I think this is
16 implied in what Mr. Kaplan said, but the short answer on
17 behalf of all the DAPS is no.

18 We've mentioned some of these other cases where
19 the *Packaged Seafood* case, the *Broilers* case, where we've
20 had many of the same clients filing cases. We've had many
21 of the same counsel both on the plaintiff's side and the
22 defense side. The class counsel in the *Broilers* case and
23 this case are substantially the same. We know each other
24 very, very well, and we're all working well together, and my
25 guess is Mr. Taylor will agree with me on this point.

1 I don't think the defendants have any complaints
2 about their communications with the DAPS. We are, as Mr.
3 Kaplan said, we're working together under a familiar
4 structure to us, and we feel comfortable that we are
5 organized and able to communicate effectively amongst
6 ourselves and with the Court and with the defendants and
7 with the classes, and catching up in the case and are on
8 track to hit all of our milestones.

9 THE COURT: Anyone else? Mr. Clark, do you want
10 to be heard from?

11 MR. CLARK: Sure, Your Honor. Thank you.

12 Just a couple kind of comments. We did notice
13 your comment about a steering committee. You know, I'm
14 certainly speaking for DPPS, and the classes will correct me
15 if I think also for the other classes. Some type of formal
16 steering committee or designated point person or liaison or
17 liaisons for the DAPS would be helpful.

18 There is some informal coordination going on. We
19 certainly don't want to put one particular DAP attorney
20 under the gun or under fire from all sides, but it would be
21 helpful to know who we're supposed to coordinate with
22 sometimes in a more formal nature. There are a lot of
23 attorneys and, yes, we do know them, but it's often hard to
24 know when we've checked the box and who we're supposed to
25 talk to.

1 And then just a second point that seemed
2 appropriate to raise from your agenda, it's gotten a little
3 bit confusing with the various names, for instance, in the
4 December 10th filing, which the classes in Puerto Rico have
5 been coordinating here for two or three years together
6 pretty closely. We didn't know what's being filed or
7 certainly didn't see a draft.

8 The names in there have just kind of gotten beyond
9 the structure of the case in our view. In our view, there
10 is not an MDL DAP and there's not pre-existing and non-MDL
11 parties. It's one MDL per your Court's Order. There are
12 DAPS, there are classes, and there is one government entity,
13 Puerto Rico, and that clarification would kind of help a lot
14 of things because these names have kind of left us at a loss
15 sometimes on what DAPS we ought to coordinate with. Those
16 are the two points I wanted to make.

17 THE COURT: All right, that's helpful. Any other
18 thoughts?

19 The Consumer Indirect Purchaser Plaintiffs, anyone
20 wish to speak there relative to this issue.

21 MS. LOOBY: Good afternoon, Your Honor. Michelle
22 Looby for the Consumer class. I would adopt what Mr. Clark
23 said we coordinated beforehand, and we agree with his
24 position as articulated today.

25 THE COURT: All right, thank you. I appreciate

1 that.

2 All right. Anything else on the plaintiffs' side
3 here? This is largely a plaintiffs' issue.

4 Defendants, you can weigh in, if you would like to
5 as well.

6 MR. BATES: Yes, Your Honor. Kyle Bates for
7 Puerto Rico. If I could just briefly be heard on the
8 nomenclature point that Mr. Clark raised, which I agree with
9 particularly. We think it's important to get the names
10 right at this point in the case.

11 I've heard Mr. Gant say a couple times today that
12 he speaks for all the DAPS, and I think it's clear but I
13 just wanted to make it clear again for the record that
14 Puerto Rico is not a part of the group that Mr. Gant speaks
15 for and the coordinating group that Mr. Kaplan was
16 referencing, Puerto Rico is not a part of that group either.

17 We certainly have been coordinating with the
18 classes for several years, as Mr. Clark notes, but it is
19 confusing to Mr. Clark's point when filings come in and
20 there is a reference to the MDL DAPS, and when we have
21 hearings like this and Mr. Gant and Mr. Kaplan are using
22 words like "the DAPS." I do think it's important that we
23 make clear, for example, that there is a group of private
24 and commercial DAPS and then there's also the governmental
25 entity Puerto Rico, which is separate. I just want to make

1 it clear for the record which positions are being taken by
2 which entities.

3 THE COURT: Good. Helpful.

4 MR. GANT: Your Honor?

5 THE COURT: Yes, go ahead.

6 MR. GANT: It's Mr. Gant. Thank you, Your Honor.
7 Just briefly.

8 We don't, as I said, we do not think a steering
9 committee is necessary. As I mentioned, and Mr. Blechman
10 alluded to in other cases like this, there are often liaison
11 counsel. Neither we nor the defendants have picked one.

12 As I mentioned, I am the liaison counsel for the
13 DAPS in the *Broiler* case. Mr. Blechman was in the *Packaged*
14 *Seafood* case. If the Court thinks it's useful, I'm sure
15 that the DAPS, and apologies to Mr. Bates for using the
16 term, but I'm sure that we will be happy to pick one amongst
17 ourselves.

18 We think that Mr. Bates sort of needs to stand
19 alone because as he acknowledges there are differences
20 between his client and their nature and their claims from
21 the private DAPS, but if you think that we should have and
22 we're happy to do so. But we did raise that with the
23 defendants many months ago, and suggested that if we were to
24 have one, they should as well, and they declined.

25 So we believe that if you're going to ask the

1 private DAPS to appoint a liaison counsel, that you do the
2 same for the defendants, so that we're all on the same
3 playing field, but we don't have any objection to doing so,
4 and we will organize ourselves accordingly.

5 We're also, for clarity and nomenclature and
6 whatever terminology we come up with collectively, we will
7 use it so we all know what we're talking about.

8 On the point about your creating, bringing the
9 classes into the MDL, I think I understood that's what you
10 intended with your order, Your Honor. I just always had a
11 question, and this is maybe more an academic question about
12 whether that is something that needs to be ratified by the
13 JPML or not, but I leave that in your hands. Presumably,
14 you don't think that needs to be done, but we will follow
15 whatever nomenclature you would like to establish, Your
16 Honor, but we've been using MDL DAPS to refer, to track what
17 the JPML did. That's what we're referring to.

18 THE COURT: Yes, I did do some checking, and I was
19 told that it was within my discretion to decide how to
20 coordinate the two sides of the case.

21 MR. GANT: Thank you for clarifying that, Your
22 Honor, but we'll come up with whatever nomenclature you
23 would like us to use.

24 THE COURT: All right.

25 MR. GANT: And thank you for all your time today,

1 Your Honor.

2 THE COURT: Oh, perfectly fine. No problem. So I
3 think that it sounds like there's at least some agreement
4 that we're getting close to being on the same track, and the
5 proposed scheduling order that Judge Bowbeer is working on
6 and has discussed with all of you envisions that. Are there
7 any issues that we should discuss about that today while
8 we're together?

9 MR. TAYLOR: Judge Tunheim, Jarod Taylor again for
10 defendants, if I may.

11 THE COURT: Yes.

12 MR. TAYLOR: So we are largely in agreement with
13 how DAPS have characterized the progress of the case so far.
14 We agree that they are so far basically on track with
15 respect to discovery and the track that the class plaintiffs
16 have been on.

17 One issue we did want to raise is that that might
18 -- will soon become more difficult. As DAPS continue to,
19 new DAPS continue to file later in the case, it will become
20 impossible under the agreed MDL DAP case schedule for them
21 to complete production of documents, for example, by the
22 September 1, 2022, deadline.

23 So this issue in a late filing, plaintiffs
24 upsetting the calendar is something we have raised before,
25 and one of our proposals to deal with it, defendants'

1 proposals in the proposed case management order we submitted
2 was for new direct action plaintiffs who file after a
3 certain date, that they would have to live with the
4 discovery taken by the earlier plaintiffs absent some kind
5 of good cause per the Court order. I think there are
6 probably other ways to deal with that.

7 Later, direct action plaintiffs could, for
8 example, be put on an indefinitely stayed second track until
9 after the first trench of cases have been resolved. I'm
10 just putting some ideas out there, but the main goal is to
11 raise that this isn't an issue now, but it is, I assume,
12 going to be an issue, assuming that new direct action
13 plaintiffs do continue to file.

14 THE COURT: Yes, it seems obvious that that's
15 going to be an issue, and I don't know if anyone knows how
16 many potential new DAPS there are out there at this point in
17 time. Any clue?

18 MR. GANT: Your Honor, this is Mr. Gant.

19 Sitting here today, I don't currently have
20 personal knowledge of anyone else that is going to file but,
21 of course, that is a possibility. I can tell you that these
22 are sophisticated parties that opted out. I think anyone
23 who didn't opt out of at least one of the two existing
24 settlements is unlikely to file based on my experience.

25 There are some who did opt out who have not filed

1 a case, and there are could be many reasons for that. I
2 think it's possible there will be none or only a handful of
3 additional filings or there could be a few more than that.
4 But I think, as Mr. Taylor acknowledged, it's not something
5 we have to tackle at present, and I think we could see what
6 unfolds over the coming months and then address it at that
7 time, Your Honor.

8 THE COURT: I think that is probably correct. I
9 appreciate Mr. Taylor pointing it out because it could be a
10 significant issue.

11 Do you know, Mr. Gant, how many opt-outs have not
12 filed at this point in time.

13 MR. GANT: I believe Mr. Taylor gave Judge Bowbeer
14 a number, so I'm going to actually pass it to my friend Mr.
15 Taylor. I think he used the number something in the 40's,
16 but he may recall the number he gave to Judge Bowbeer on
17 Monday.

18 MR. TAYLOR: I think about 40 is our count, Your
19 Honor.

20 THE COURT: Okay. All right. Anyone else wish to
21 speak on this issue before we wrap up today?

22 MR. KAPLAN: Well, there is one additional case
23 that has been filed that will probably be transferred in.

24 THE COURT: Okay. So there's one on the way.
25 Somewhere between the headquarters of the JPML and here.

1 MR. KAPLAN: Right.

2 THE COURT: All right. That's helpful.

3 All right. Anything else we should discuss today?

4 I will give the steering committee versus liaison counsel
5 some thought here, and I'll let you know if I need any more
6 information from you. I do think some sort of coordination
7 is appropriate and would be helpful, but I want to think it
8 through before I go any further, and I'll perhaps discuss
9 this with Judge Bowbeer as well.

10 So anything else we should discuss today while
11 we're together?

12 MR. ROBISON: Your Honor, just briefly, Brian
13 Robison for Smithfield.

14 THE COURT: Yes, Mr. Robison.

15 MR. ROBISON: Your Honor, I know there's been a
16 lot of discussion with both Your Honor and Judge Bowbeer
17 about the idea of a consolidating complaint and serves
18 affirmative defenses, whatever the Court decides to do on
19 those issues, all the parties in the DAP cases could also
20 use guidance on how motions to dismiss are going to be
21 handled.

22 There's a lot of talk at all of these hearings
23 about answers and affirmative defenses and defenses and
24 whether *Twombly* applies to those, but once we get to
25 motions to dismiss, there is a lot less talk, and so it's

1 not clear, at least on the defense side how exactly Mr.
2 Gant or Mr. Blechman would envision motions to dismiss and
3 the statute of limitations, for example, whether we're going
4 to be able to file one against an exemplar DAP complaint or
5 whether we need to file 24.

6 So that's something that's really on the
7 defendant's radar, but at some of these hearings it doesn't
8 seem to get as much argument as the answer, so that's
9 something we would like to seek guidance from the Court on
10 how the Court wants us to handle those.

11 THE COURT: Good point, Mr. Robison, and I think
12 that that's probably the subject for our next status
13 conference to discuss ideas for how to proceed there.
14 Obviously, I normally would prefer one to 24, but at the
15 same time, we'll try to do this in a way that best protects
16 everyone's interests on both sides.

17 MR. ROBISON: Thank you, Your Honor.

18 THE COURT: All right. Anything else? I
19 appreciate you raising that Mr. Robison.

20 All right. Thank you, everyone. I'll work with
21 Judge Bowbeer. We'll get the scheduling order out shortly,
22 and we will proceed. I appreciate you joining us all by
23 virtual hearing today, and it's good to see all of you.
24 Have a good weekend.

25 COUNSEL (collective response): Thank you, Your

1 Honor.

2 THE COURT: We'll be in recess.

3 (Court adjourned at 12:08 p.m.)

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7 **REPORTER'S CERTIFICATE**

8 I, Maria V. Weinbeck, certify that the foregoing is
9 a correct transcript from the record of proceedings in the
10 above-entitled matter.

11
12 Certified by: s/ Maria V. Weinbeck
13 Maria V. Weinbeck, RMR-FCRR
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